1987

Norman Barber v. The Emporium Partnership : Brief of Appellant

Utah Court of Appeals

N. George Daines; Daines & Kane; attorneys for respondent.
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IN THE UTAH COURT OF APPEALS

NORMAN BARBER and HELEN BARBER,
Plaintiffs/Respondents,

vs.

THE EMPORIUM PARTNERSHIP, et al.
Defendants/Appellants.

Case No.870128-CA
(Category 13b)

BRIEF OF APPELLANTS

APPEAL FROM AN ORDER OF THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

JUDGE VENOY CHRISTOFFERSON

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LIST OF ALL PARTIES

PLAINTIFF

Norman Barber and Helen Barber, husband and wife.

DEFENDANTS

The Emporium Partnership,
a Utah Limited Partnership

Individual Alleged Partners:

Von K. Stocking

Don A. White, Jr.

Raymond N. Malouf, Jr.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

I.

Whether Plaintiffs are restricted from accruing interest on a judgment where its face specifies a specific dollar amount for interest to be paid from the date of judgment "until the judgment is paid", where this language in the judgment is the same as it is in the Findings of Fact and Conclusions of Law, and which wording was submitted by Plaintiffs and the judgment was never amended.

II.

Whether attorney fees can be allowed to remain in a judgment where the affidavit supporting the attorney fees was never served on opposing parties and objections to this contested issue of fact were made within three months of entry of judgment and the Court did not decide or explain that issue, but said it went to the priority and enforceability and allowed Defendants to "take any appropriate action" when the judgment is sought to be enforced".

III.

Whether a judgment can be entered or enforced against a limited partnership when enforcement of a judgment on behalf of a limited partner is contrary to the terms of the partnership agreement, and such fact is raised as a disputed factual matter prior to and within three months of the entry of the judgment, and the Court did not decide or explain that issue, but said it went to the priority and enforceability and allowed Defendants to "take any appropriate action when the judgment is sought to be enforced".

IV.

Whether judgment can be entered in favor of one acting through and with a limited partner, where the factual question of whether that person was subject to limitations of the partnership agreement, was raised to the Court prior to and within three months after entry of the judgment and the Court did not decide or explain that issue, but said it went to the priority and enforceability and allowed Defendants to "take any appropriate action when the judgment is sought to be enforced".

STATEMENT OF FACTS

The Complaint was filed January 17, 1979 to seek payment of a promissory note from general partners of the Emporium Partnership to a limited partner and her husband. (Record hereinafter "R" 1-4). Judgment on the pleadings was entered (R 36-41) against Defendants, over their objections contesting various factual issues. (R 11, 12, 26-9, 34-5, 49-51). Two of the facts Defendants tried to preserve for trial were (1) whether the partnership agreement and Utah law precluded any judgment or enforcement of a judgment against the alleged general partners of a limited partnership in this instance (R 12, 26-9, 34-5, 49-51, 56-7), and (2) whether an award for attorneys fees was even proper (R 51, 57) in view of no justification for them and Plaintiffs' failure to ever serve their affidavit in support of the fees on Defendants. (R 23, 57).

Notification of service of that affidavit was never given to the Court (R 23), and Defendants never received the affidavit. (R 57). In allowing the judgment to stand, the Court did not discuss the specific matters, but characterized Defendants' requests generally as going " . . . to questions of how the judgment should be enforced and priorities in connection therewith". With respect to these matters, the Court ruled that Defendants could " . . . take any appropriate action when the judgment is sought to be enforced". (R 58, 59)

The judgment awarded a fixed dollar amount of interest to apply from the date of the judgment until the judgment was paid.

(R 40). It is specific in its wording, limiting interest to $2,180 ". . . from the date hereof until paid." This language agrees with the prayer of the Complaint (R 2) and is the same in the Findings of Fact and Conclusions of Law (R 36-8), all prepared by Plaintiffs.

Over the years Plaintiffs never sought to amend the judgment. In filing writs of execution and motions in an attempt to enforce the judgment, Plaintiffs falsely caused the Court to issue pleadings prepared by them attesting that the judgment allowed interest other than what is provided in the judgment, and that all that money was unpaid and due. (R 148-9, 158-9, 204, 262-5). Defendants filed motions to quash these writs, claiming they were illegal for the reasons preserved from the beginning (R 58, 59); or were for unenforceable amounts. (R 206-214, 241-249, 259-265, 282-5).

The Court persisted in refusing to address the specific requests of the Defendants in denying Defendants' Motions to Quash execution for more than the judgment. (R 252-3, 287). The Court also ignored its promise that Defendants could "take any appropriate action" when Plaintiffs tried to enforce the judgment. (R 58-9, 260). The Court refused to quash the writ by its Memorandum Decision November 20, 1986 (R 287) and Order December 1, 1986. (R 290). Defendants objected to the form of the Order (R 292) and moved the Court under Rule 52(b) to amend and make additional findings (R 288, 294) to clarify this ruling, pointing out the limits to the judgment the Court was ignoring, and that

the judgment had never been amended. The Court refused to do this by claiming it was unaware of provisions in the rules allowing it to make additional findings (R 300) and entered its Order December 26, 1986. (R 301). Defendants filed a Notice of Appeal January 23, 1987. (R 303).

On appeal, Defendants seek an order specifically limiting the amount Plaintiffs can collect to the amount provided, and limited, in the judgment. They also ask for an order quashing all execution efforts based on writs for improper amounts. Because in ruling on Defendants' timely Motions for Relief, the Court reserved to the Defendants the right to take any appropriate action when Plaintiffs tried to enforce the judgment, Defendants also ask the Court to (1) agree that the partnership agreement precluded enforcement of the judgment against the general partners; and (2) rule that the award of attorneys fees was improper in any event. Defendants believe these are appropriate requests because of the reservation made to Defendants (R 58, 59) by the District Court when it refused to address these specific issues raised immediately after the judgment. There was no limit on time to raise these matters again after the Court's ruling, which allowed them all to be raised when Plaintiffs sought to enforce their judgment. [1]

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[1]/ These additional requests for relief: to rule on Plaintiffs' right to the judgment in the first place, to set aside a portion of it, and to grant relief - otherwise would be made too late under Rules 59 and 60(b). However, the Court chose to reserve these rights to Defendants for reasons best known to itself but relied on by Defendants.

SUMMARY OF ARGUMENT

This matter is before the Court on Appeal of the Court's refusal of Defendants' Motion to Quash Writs of Execution which attempted to enforce execution of an amount in excess of an amount allowed by the judgment. That execution must be stricken as void, and as beyond any authority of the District Court. The language of the judgment is clear. It says the interest the Plaintiffs were seeking to add to their judgment was not permitted. A specific amount was stated for interest until the judgment was paid. The judgment was not amended. The judgment must be limited by the Appeals Court to only the relief specified therein.

The finality of at least part of the judgment is itself also open to question, as is the enforceability of the judgment. Although the Court allowed a Summary Judgment, in denying the legal and factual arguments raised by Defendants when they filed motions under Rule 59 and Rule 60(b) to change the judgment, and for relief from judgment actually allowed, the Court permitted Defendants to raise at least two issues whenever the Plaintiffs tried to enforce the judgment. Thus, the Court should also deny the allowance of $4,000 in attorney fees, since a timely objection was made, but preserved for Defendants by the Court. That part of the judgment was not supported with notice to Defendants of the insufficient evidence for the fees. Similarly preserved was the question of enforceability of a judgment for Plaintiffs

who are also limited partners, when it is specifically contrary to the terms of the partnership agreement. The factual matters which would restrict one or both of these Plaintiffs from being able to sue as general creditors of the partnership, since they were also limited partners, were preserved to Defendants by the same ruling of the trial court (R 58, 9).

ARGUMENT

THE JUDGMENT IS UNENFORCEABLE OR MUST BE LIMITED TO ONLY THE RELIEF SPECIFIED THEREIN.

The judgment is unlike other judgments. It does not allow interest to accrue until the judgment is paid. It limits the interest to $2,180. This limitation was built into the prayer and the judgment by Plaintiffs' draftsmen. The judgment was never amended. Evidence was never properly admitted to support the judgment which was entered.

I.

WRITS OF EXECUTION IN EXCESS OF THE AMOUNT ALLOWED BY THE JUDGMENT ARE VOID AND BEYOND ANY AUTHORITY OF THE DISTRICT COURT.

The judgment allows only a specific amount for interest so the writs were illegal. The amount of interest allowed by this judgment is clearly and specifically limited to $2,180 from the date of judgment until the judgment is paid. The judgment does not allow interest to accrue, but provides a set amount until the

judgment is paid, using limiting language. No more interest is allowed. In fact, the prayer in the Complaint asked for interest only "until judgment" (R 2). The prayer, Findings of Fact and Conclusions of Law, and Judgment are all consistent with each other in allowing less interest than a typical judgment. Interest accruing until payment was neither requested nor part of the judgment. Though unusual, the judgment is clear on its face.

By State Law, if a judgment is to bear interest, the judgment itself must recite the interest. Section 15-1-4 U.C.A. provides as follows:

> Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; . . . (emphasis added)

The note was a contract. To get interest, the judgment had to specify it. The judgment does not allow for what the Plaintiffs wish it did. It specifically provides for something other than what the law might have allowed had the Complaint, the Findings and the Judgment all been prepared differently. The difference is a material one. It is not a mere failure to record a judgment as rendered. Plaintiffs have to accept it unless it is vacated and they make a timely motion for a new trial, bring a timely appeal, or bring a new action. It is not a clerical error which can be corrected under Rule 60(a).

None of this should be surprising. If the judgment had allowed more, it would have allowed more than the Complaint asked for. Moreover, neither the present counsel for the Plaintiffs,

who entered an appearance less than three months after the judgment was entered, nor previous counsel, moved to amend the Findings of Fact or the Judgment under Rules 59 or Rule 52(b). No modification was requested under any other rule, either. Even though it is atypical and may be surprising, the judgment really does limit the interest.

The omission of the language allowing interest to accrue is not a mere error by the Clerk which can be reformed. In Elliott v. Bastian, 11 Utah 452, 40 P.713 (1895), this Court would not permit a requested change in a judgment even six months after its entry because the judgment was not void on its face. Here to, the omission of language allowing interest is not a mere error that can be reformed. Although the Court entered judgment over Defendants' objections, those objections were preserved for them. However, there is no opportunity for the Plaintiffs to change it by ignoring its plain language and pretending it allowed more than it does.

Richards v. Siddoway, 24 U.2d. 314, 471 P.2d 143 (1970) concludes a long list of Utah decisions dating from 1895 that squarely support the position that the only basis for changing the amount of money allowed by a judgment is for the judgment itself to be amended. It is often referred to for the distinction between judicial and clerical errors.\[2] The problem in the

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[2]/ Bagnall v. Suburbia Land, 579 P2d 917, 918 (Utah 1978); Spomer v. Spomer, 580 P2d 1146, 1149(Wyo. 1978); Laub v. South Central Utah Telephone, 657 P2d 1304, 1308 (Utah 1982); Lindsay v. Atkin, 680 P2d 401, 402; Bershad v. McDonough, 469 F2d 1333 (N.D. Ill., 7th Cir. 1972)

present judgment is not clerical, from wrongly recording a judgment as rendered. At most it was a judicial error, from an error in rendering the judgment. Richards held a judicial error can only be cured by a timely motion for new trial, amended findings, appeal or a new action. Here the "error" wholly belongs to Plaintiffs and their counsel. The judgment entered is clear in limiting the interest, and is enforceable only to a certain amount, much less than Plaintiffs' seek.

The writs of execution seeking enforcement of greater amounts are void for being in conflict with the judgment and Rule 69(b), which requires the writ to recite the actual amount due. Their issuance was an abuse of process.

Utah has long held that judicial tribunals may not exercise revisionary power over adjudications after they have, in contemplation of the law, passed away from the Judge. See Benson v. Anderson, 14 U. 334, 47 P. 142 (1896). Where an effort to change a judgment six months later was too late. This Court also held in Frost et. al. v. District Court et. al., 96 U. 106, 83 P.2d 737 (1938), that " . . . after the time for appeal has expired, the Court has no power to modify a judgment in a substantial or material respect. This is well-settled law." The parties there wanted to change a water flow priority four years after the judgment. The Court refused the change because it was a substantive one. The judgment could not be opened or vacated.

There was no testimony or trial of the issues in this present action. There was, therefore, no reason for the Findings of Fact,

Conclusions of Law or Judgment to allow more relief than was asked for in the prayer. Any explanation about what might, could or should have been included in the judgment does not change either the specific request in the Complaint, the Findings, the Conclusions or the Judgment. A change in the judgment cannot be made by Plaintiffs' presentation of writs of execution in illegal amounts that the Court refuses to quash. The Court's de facto allowance of more relief than permitted is sufficient reason to render the writs and judgment unenforceable to the extent of the excess. See Russell v. Shurtleff, 65 P.27 (Col.1901). Only that part of a judgment included within the prayer of the Complaint could be valid, and Coleman v. Meyer 483 P2d 48, 50 (Oregon,1971).

All efforts of execution and supplemental proceeding or other enforcement of the judgment based on unenforceable writs should not only be quashed but set aside, and Defendants ought to be allowed damages for the Plaintiffs' abusive process where the writs were contrary to U.R.C.P. 69(b). Rule 69(b) requires writs to recite the actual amount due. Plaintiffs' writs were in error. The District Court lacks authority to permit issuance of illegal writs of execution. If Plaintiffs claim these were justified by an error in the judgment, the error was wholly attributable to Plaintiffs, was judicial in nature, and could not be cured by clever drafting or the Court's oversight. Defendants do not waive their right to have such writs stricken.

Allowance of writs for more than the judgment has the effect of amending the judgment without due process of law. Such action

conflicts with Defendants' rights under the Fifth and Fourteenth Amendments to the U. S. Constitution and Article I, Section 7 of the Utah Constitution by illegally taking Defendants' property. Defendants were already denied procedural due process under Rule 12(c), Rule 56(c), Rule 5(a), 48-2-13 U.C.A. and the Utah Constitution when the judgment was entered over factual objections which should have been resolved, but which were instead preserved by the Court.[3] For the Court to permit writs for the wrong amount is to allow a judgment for other than that which was demanded, and deprives Defendants of their day in Court. See Becker v. S.P.V Construction Company, 612 P.2d 915 (Cal. 1980).

The findings and judgment were prepared by the Plaintiffs. The Complaint was signed by Plaintiffs. It is illegal and unfair for the Court to allow enforcement of the judgment for any more than what was actually provided for. The judgment in fact does not vary from the Findings of Fact and Conclusions of Law. The judgment has remained uncontested by Plaintiffs. The Court's acquiesence in efforts to enforce it for a greater amount makes the Court and the law look impotent. The Rules of Procedure and statutes of Utah are for everyone to follow. Defendants are

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[3]/ Defendants' pleadings raised both factual and legal defenses that the Court did not address specifically and may have ignored, as is explained in the statement of facts. Nevertheless, these were preserved by the Court's order (Addendum J) for whenever enforcement was attempted. So the only due process Defendants received was the right to bring the matters up at any and all such times. In denying Defendants' Motion to Quash the writs (R 259-287), the Court ignored that promise, allowed Plaintiffs to issue writs contrary to the judgment, and destroyed Defendants' rights to due process.

entitled to rely on a Court with integrity. Anything short of that denies the Defendants' procedural due process, and is the means for Plaintiffs to take property from the Defendants without due process.

II.

"APPROPRIATE ACTION" INCLUDES DEFENDANTS' REQUEST TO SET ASIDE WRITS AND ALL OR PART OF THE JUDGMENT.

Whatever was meant when the Court said the Defendants were entitled " . . . to take any appropriate action when the judgment is sought to be enforced" (R 58) should be liberally applied in favor of Defendants. The Court's intent which appeared so plain, has remained a mystery because the Court ignored its own words. Issues before the Court (see Statement of Facts) when the Court made this promise to Defendants were (1) whether a judgment should issue at all because of disputed facts about the partner status of each of the Plaintiffs; and (2) whether attorney fees were proper at all, particularly where Defendants had no notice of the affidavit in support of the request for attorneys fees.

Inherent within the first issue are questions of whether U.C.A. 48-2-13 and the partnership contract restricted limited partners from privileges of suit in recovering a loan made to this partnership; and whether Mr. Barber was to be treated like Mrs. Barber as a limited partner. Whether either Plaintiff should be precluded from enforcing a judgment against general partners

because of the partnership agreement, U.C.A. 48-2-13, and the partnership's financial status was brought up by Defendants before and after the judgment (R 11, 12, 26-9, 34-5, 49-51). The basis for any award for attorney fees in the judgment was challenged by Defendants before the Court (R 51, 57). Defendants were never served the affidavit Plaintiffs used to justify the fee (R 23, 57). This violated Defendants' rights under Rules 5(a), to be served copies of pleadings, and 56(c). After all this, Defendants were entitled to a reasoned response. The Court did not address these issues, however. Instead, the Court allowed them to be brought up whenever the Defendants were pressed to pay the judgment; to wit: These issues were classified by the trial court as going to priorities and enforceability (R 58).

The Court apparently considered Plaintiffs' motion for judgment on the pleadings (R 13) under Rule 12(c) U.R.C.P. as a motion for summary judgment under Rule 56, which allows the parties to submit affidavits. However, the Court did not advise the parties the matter would be decided under Rule 56. Instead of filing opposing affidavits, Defendants argued the legal basis for the affirmative defenses, and attached copies of some of their evidence to support their facts. This response showed specific facts to be tried. (R 26-9, 34-5). Defendants' Motion for Relief under Rule 59 and other rules (R 49-51) resulted in the unique memorandum (R 58) and order (R 59) permitting Defendants to bring up all their arguments "when the judgment is sought to be enforced." The enforceability of the judgment was thus a question

preserved forever by the Court. At times this was honored (R 73), but usually it was not (R 91). The jurisdiction of the Court to permit any writs to be issued, in view of this language, was nevertheless preserved as a factual and legal question by the Court itself.

Plaintiffs' affidavit in support of attorneys fees was never served on the Defendants and lacks a mailing certificate. (R 23, 57). Summary Judgment should not have been entered for the attorney fees. Under Freed Finance Co. v. Stoker Motor Co., 537 P2d 1039, 1040 (Utah 1975), even a summary judgment cannot award undisputed attorney fees without a stipulation, evidence of the actual amount, or an unrefuted affidavit. The unrefuted affidavit should not be considered filed since it was not served on Defendants (R 23, Rule 5(a) U.R.C.P.). Even if accepted, where judgment was granted on the pleadings, the affidavit does not meet the standard that there must be evidence of the necessity and reasonableness of the attorney fees.

This standard was reaffirmed by Cluff v. Culmer, 556 P2d 498 (Utah 1976), which cites Freed at 499. This Court has said there must be evidence to support the reasonableness and necessity of attorney fees. In allowing these, the trial court abused its discretion because proper evidence was lacking. Mueller v. Cache Valley Dairy 657 P2d 1279 (Utah, 1982); Trayner v. Cushing 688 P2d 856 (Utah, 1984 - attorney fees are limitable to appropriate amounts). Cabrera v. Cottrell 694 P2d 622 (Utah, 1985 - Findings should be made which support the award). Defendants raised the

point that they had no knowledge of the affidavit and opposed entry of a judgment for that amount (R 57). Instead of addressing the matters specifically, the Court allowed that subject and the others to be brought up later if the Plaintiffs sought to enforce the judgment. (R 58, 59). Defendants relied on this.

To uphold the judgment denies due process rights under the United States Constitution Amendments V and XIV(1), and also violates Article I Section 7 of the Utah Constitution. Entry of judgment including the attorneys fees without serving Defendants with the affidavit violated Utah Rule of Civil Procedure 5(a). The trial court that ignored this requirement also said Defendants could bring this matter and the others up whenever Plaintiffs tried to enforce the judgment (R 58). They brought it up, but the Court broke its promise. To the extent of those fees, the judgment and any writs for that amount are beyond the Court's jurisdiction. It was the Court that characterized all those claims as going to "enforceability and priority" (R 58). Since the Court defined Defendants' claims that way, and made that offer, Defendants chose not to appeal at that time, but to rely on the Court's offer to decide the matters later. The Court never did decide them.

The other factual matter on which Defendants opposed summary judgment centered on the financial status of the partnership, partnership agreement and status of limited partner Plaintiffs, particularly in view of Section 48-2-13 U.C.A. which provides:

> **48-2-13 Loans and other business transactions between partnership and limited partner.** (1) A limited partner also may lend money to, and transact other business with the partnership, and, unless he is also general partner, receive on account of resulting claims against the partnership, with general creditors, a pro-rata share of the assets. If, at the time of receipt, the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners, no limited partner shall in respect to any such claim:
>
> (a) Receive as collateral security any partnership property or,
>
> (b) Receive from a general partner or the partnership any payment, conveyance, or release from liability.
>
> (2) . . .
>
> (3) The . . . receiving of a payment, conveyance or release in violation of the provisions of subsection (1) or (2) is a fraud on the creditor's of the partnership.
> (emphasis added)

The foregoing clearly forbids a limited partner to receive any property from general partners even for a loan unless all non partners can be paid first. Limited partner creditors are not treated equally with the non-partner creditors of a partnership! This language puts a creditor of the partnership who happens to be a limited partner in a lesser position than other creditors. Apparently the policy is to avoid the appearance of favoring creditors who are limited partners. The facts which require the application of this statute were raised by Defendants in the Record at R 26-29, R 34-35; again at R 49-51 and R 56 to 57 as well as in the Answer, R 11, 12. Yet this point, too, was designated by the Court as going to priority and enforceability

(R 58). It was preserved for the Defendants to bring up in case the Plaintiffs should ever try to enforce their judgment.

The only logical interpretation of the June 5,1979 (R 58, 59) order is that the Court at that time intended Plaintiffs could never enforce their judgment until the restrictions of Section 48-2-13 were removed. If Plaintiffs tried to collect, the Court would then rule on this matter, and the others. There was no restriction on how long these defenses would last, but presumably it would be as long as the judgment lasted. The very enforceability of the judgment was thus preserved. The general creditors had not been paid and the Court knew this. (R 77-88). However, on numerous occasions the District Court has refused to honor its obligation and pledge to require this statute to be enforced, even though it had knowledge it should be. (R 91, 94-9, 106-7, 110, 135-9, 148-9, 150-6, 166-8, 179, 189-193, 241-9, 252-3, 287, 300). Instead, when Defendants made motions for the Court to consider which went to the priority and enforceability of the judgment (the Court's own definition), the Court said it had already denied that issue, and ignored Defendants' request. The Court has not, however, denied those issues. It preserved them, like pickles, but never allowed the preserves to be opened. Its subsequent actions contrary to Defendants' rights are void. The Court never gave specific reasons for its action on these matters, which were plead as defenses and raised in response to the motion for the judgment, even when specifically raised immediately after the judgment. Defendants nevertheless were <u>not</u> foreclosed from

continuing to raise them anytime Plaintiffs tried to enforce the judgment. The amount and enforceability of the judgment are thus both long preserved matters, even though a judgment was entered.

Although some points are brought up again long after the judgment, the Court actually preserved these rights to the Defendants. This Court should decide Plaintiffs' priority and the enforceability of the judgment as of the time the Motion to Quash was made, in light of the issues raised there. The trial court refused to do it before. The legal questions are still alive, and Defendants request appropriate orders be made to require the setting aside of (1) writs in excess of the face amount of the judgment; (2) writs and judgment to the extent of the illegal and unsupported attorney fees; and (3) judgment to the extent the Court's orders were in excess of the jurisdiction allowed by Section 48-2-13, U.C.A. Defendants also seek attorney fees on appeal.

CONCLUSION

The trial court should not have allowed summary judgment, but it did. However, it left open the finality of at least part of that judgment, and the enforceability of all of it is open to question. The Court's language (R 58), allowing Defendants to raise forever the legal and factual arguments it said went to priority and enforceability should have protected the Defendants, who tried to rely on it. These matters were raised by the Defendants when Defendants filed motions under Rule 59 to change

the judgment and Rule 60(b) for relief from that judgment. The Court allowed Defendants to raise these issues whenever Plaintiffs tried to enforce the judgment.

Irrespective of the finality of the judgment, the language of the judgment is not subject to question, and the interest that the Plaintiffs seek to add to the judgment is neither allowed by it nor can the judgment be changed to allow it now. The judgment must at least be limited by this Court to allow only the relief specified. Plaintiffs' efforts to enforce writs of execution in excess of the amount allowed by the judgment must be stricken as void and beyond any authority of the District Court.

DATED this 11th day of May, 1987.

RNM

Raymond N. Malouf

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 1987 four copies of the foregoing Appellant's Brief was mailed postage prepaid to :

N. George Daines, Esq.
DAINES & KANE
Attorneys at Law
108 North Main, Suite 200
Logan, UT 84321

Secretary

Addendum

Parts of the Record, as follows:

STATUTES:

U.S. CONSTITUTION,
Taking property without due process:
- Amendment V . . . . . Attached
- Amendment XIV, Section 1 . . . . . Attached

UTAH CONSTITUTION,
Taking property without due process:
- Article I, Section 7 . . . . . Attached

UTAH CODE (1953)

Section 15-1-4 - Any judgment . . . . . Attached
rendered from a lawful contract shall
conform thereto and shall bear the
interest agreed upon by the parties,
which shall be specified in the judgment.

Section 48-2-13 - Limited partner . . . Attached
who has loaned money to the partnership
cannot receive from the partnership or
from the general partner any payment etc.
for the loan made if at the time the
assets of the partnership are insufficient
to discharge partnership liabilities.

RULES:

UTAH RULES OF CIVIL PROCEDURE

Rule 5(a) - All pleadings must be . . . . . Attached
served on opposing parties.

Rule 12(c) - Motion for judgment on . . . . Attached
pleadings treated as a motion for
Summary Judgment when matters outside
the pleadings are presented but not
excluded.

Rule 52(b) - Motions to amend or make . . . Attached
additional findings.

Rule 56(c) - Summary Judgment proper . . . . Attached
only where uncontested issues of fact.

Rule 59 - New trials amendments of . . . . . Attached
judgment.

Rule 69(b) - Writ must recite actual . . . . Attached
amount due.

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

NORMAN BARBER and HELEN BARBER, Husband and Wife,	)	
Plaintiff	)	MEMORANDUM DECISION
v.	)	
THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR., General Partners,	)	Civil No. 17630
Defendants	)	

Defendants have filed a Motion to Quash a Writ of Execution. Defendants had previously filed a Motion for Quashing a Writ of Execution that was issued previous to the second one. After an examination of the documents, writs, judgments, etc., it appears that this writ is the same as the other one where the motion was denied.

The Court will therefore deny this one. Counsel for plaintiff to prepare the appropriate order.

Dated this 20th day of November, 1986.

BY THE COURT:

VeNoy Christoffersen
District Judge

Copy of the above mailed to
N. George Daines - 108 No. Main, Suite 200 - Logan, Utah 84321
Raymond N. Malouf - 150 East 200 North #D - Logan, Utah 84321
this 20th day of November 19 86
SETH S. ALLEN, Clerk
By Lotta C. Campbell

SETH S. ALLEN, Clerk
By _____ Deputy
NOV 20 1986

EXHIBIT A

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife,	*	
Plaintiff,	*	O R D E R
vs.	*	Civil No. 17630
THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR., general partners,	*	
Defendants.	*	

Defendant having made Motion to quash the Writ of Execution with Memorandum supporting the same, and Plaintiff having responded thereto, the Court thereupon entered its Memorandum Decision determining that after examination of documents, writs, judgments, etc., it appears to the Court that the Writ of Execution is the same as the previous one wherein this same Motion was denied.

BASED THEREON, the Court therefore denies this Motion finding that the Writ of Execution should not be Quashed and Plaintiff should be allowed to proceed therewith.

DATED this 1st day of ~~November~~ December, 1986.

BY THE COURT:

District Judge

Number 17630-98

DEC 1 1986
SETH S. ALLEN, Clerk
Deputy

EXHIBIT B

Raymond N. Malouf/md
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North, Suite D
Logan, Utah 84321
Telephone:(801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT

STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiffs, vs. THE EMPORIUM PARTNERSHIP, et. al., Defendants.	)	MOTION TO MAKE ADDITIONAL FINDINGS Civil No. 17630

Come now the Defendants and move the Court to amend and or make additional findings to the memorandum decision dated November 20, 1986, and to amend the Order accordingly, to wit: (1) The Court should find that the judgment may only be enforced in the total amount of $21,211.30, less payments received, which in fact is all the judgment allows. (2) The Court should stay enforcement of the judgment until the writ is modified.

This Motion is based on the citations and argument presented in Defendants' Reply, dated November 17, 1986, which points out (1) the limitations of the judgment as entered in this case; (2) the fact that there has been no amendment to the judgment; and (3) decisions by the Utah Supreme Court mandating methods for amending a judgment.

This Motion is brought under Rules 52(b) and 77(a), U.R.C.P. Defendants request appropriate relief from the proceedings Plaintiff is pursuing, under Rule 65B(b)(2)(4).

Dated this 25 day of November, 1986.

Raymond N. Malouf

Number 17630-97

EXHIBIT C

Raymond N. Malouf/md
MALOUF LAW OFFICES
Attorney for Defendant
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Telephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT

STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiffs,	)	OBJECTION TO FORM OF ORDER
vs.	)	
THE EMPORIUM PARTNERSHIP, et al., Defendants.	)	CIVIL NO. 17630

COME NOW the Defendants under Rule of Practice 2.9 and object to the form of the order submitted December 1, 1986, which was supposed to implement the terms of the memorandum decision of November 20, 1986.

Defendants object to the language at the end of the form that says "Plaintiff should be allowed to proceed therewith.", referring to the writ of execution. The court did not order that the Plaintiff should be allowed to proceed in its memorandum decision, but merely refused to quash the writ. Inasmuch as there is already a motion to make additional findings before the court, which would allow the court to address the question of what amount the judgment actually allows to be collected. The gratuitous insertion of the objectionable language in the order is inappropriate.

Dated this 2nd day of December, 1986

Number 17630-99

Raymond N. Malouf

1986
SETH S. ALLEN, Clerk
By _____ Deputy

292

EXHIBIT D

Raymond N. Malouf/md
MALOUF LAW OFFICES
Attorney for Defendant
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT

STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiffs,	)	REPLY
vs.	)	
THE EMPORIUM PARTNERSHIP, et al., Defendants.	)	CIVIL NO. 17630

COME NOW the Defendants and reply to the response dated November 28, 1986 by Plaintiffs.

The merits of the motion have never been ruled on. If the points raised by this motion have been made and denied, neither the court nor counsel can demonstrate where, for the record does not show it. The merits of the motion have never been specifically ruled on by the court. That is why the motion for additional or amended findings was made.

Dated this 2nd day of December, 1986.

Raymond N. Malouf

Number 17630-100

DEC 2 1986

SETH S. ALLEN, Clerk

By _____ Deputy

EXHIBIT E

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

NORMAN BARBER and HELEN BARBER, Plaintiffs	)	
v.	)	MEMORANDUM DECISION
THE EMPORIUM PARTNERSHIP and VON K. STOCKIMG, DON A. WHITE, JR., and RAYMOND N. MALOUF, general partners	)	Civil No. 17630
Defendants	)	

Defendant has filed a motion to make additional findings. The Court knows of no provision for such a motion. Therefore denies the same.

As to the objection to the form of the order, the Court feels this has already been ruled upon and therefore denies the objection.

Counsel for plaintiff to prepare the appropriate order.

Dated this 16th day of December, 1986.

BY THE COURT:

VeNoy Christoffersen
District Judge

Copy of the above mailed to.
George Daines - 108 No. Main, Suite 200 - Logan, Utah 84321
Raymond N. Malouf - 150 East 200 No., Suite D - Logan, Utah 84321
this 16th day of Dec. 19 86
SETH S. ALLEN, Clerk
By Dottie C. Campbell
Deputy

SETH S. ALLEN, Clerk
By [illegible] Deputy

EXHIBIT F

BOOK 065 PAGE 362

300

N. George Daines - 0803
DAINES & KANE
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4403

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER,	*	
Plaintiffs,	*	ORDER
vs.	*	Civil No. 17630
THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, general partners,	*	
Defendants.	*	

Defendant has filed a Motion to Make Additional Findings and Objection to Form of the Order. The Court having received the response of the Plaintiff, now enters its order denying the Motion to Make Additional Findings determining that the same is not a proper motion. The Court also denies the objection to the form of the Order having determined that this objection has already been ruled upon.

DATED this 26th day of December, 1986.

BY THE COURT:

VeNoy Christoffersen
District Judge

Number 17630-104

[illegible]

SETH S. ALLEN, Clerk
By _____ Deputy

BOOK 065 PAGE 463

EXHIBIT G

301

Raymond N. Malouf/md
MALOUF LAW OFFICES
Attorney for Defendant
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT

STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiffs,	NOTICE OF APPEAL
vs.	
THE EMPORIUM PARTNERSHIP, et al., Defendants.	CIVIL NO. 17630

NOTICE IS HEREBY GIVEN that Defendants hereby appeal to the Supreme Court of the State of Utah from the order entered in this action on December 1, 1986, which was based on a memorandum decision of November 20, 1986, against which Defendant's Rule 52(b) motion was filed November 26, 1986, which 52(b) motion was denied by order filed December 26, 1986, less than 30 days preceeding this Notice of Appeal, and from all related, underlying or preceeding orders related thereto which have also been preserved by the Court or the parties for appeal.

DATED this 23 day of January, 1987.

MALOUF LAW OFFICES

Raymond N. Malouf
Attorney for Appellant/Defendant

umber 17630-105

JAN 23 1987
SETH S. ALLEN, Clerk
By _____ Deputy

303

EXHIBIT H

B. H. HARRIS
HARRIS, PRESTON & GUTKE
Attorney for Plaintiffs
31 Federal Avenue
Logan, UT 84321
Telephone: 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY,
STATE OF UTAH
----oooOooo----

NORMAN BARBER and HELEN BARBER, husband and wife,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR., general partners,

Defendants.

JUDGEMENT

Civil No. 17630

----oooOooo----

THIS MATTER came on regularly for hearing before the Court without a jury on the Plaintiff's Motion for Judgement on the Pleadings. The affidavits and memorandum having been submitted to the Court by the parties and the Court having entered its Memorandum Decision on the 11th day of April, 1979, and based thereon, the Court having made and filed herein its Findings of Facts and Conclusions of Law and based thereon;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs have recovered judgement against the Defendants in the amount due on a promissory note in the amount of Fifteen Thousand ($15,000.00) Dollars plus accrued interest at the rate of 12 percent per annum from date hereof until paid in the amount of Twenty-one Hundred Eighty ($2,180.00) Dollars, attorney fees in the amount of Four Thousand ($4,000.00) Dollars and court costs in the amount of Thirty-one and 30/100 ($31.30) Dollars.

HARRIS, PRESTON & GUTKE
ATTORNEYS-AT-LAW
31 FEDERAL AVENUE
LOGAN, UTAH 84321
PHONE 752-3551

Number 17630-17

FILED APR 16 1979

[illegible] S. ALLEN, Clerk

EXHIBIT 1
BOOK 41 PAGE 1027

DATED this 17 day of April, 1979.

DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Judgement to Raymond N. Malouf of MALOUF & MALOUF, Attorney for Defendants, 21 West Center, Logan, Utah 84321, this _____ day of April, 1979.

(Court file checked 2/20/87 — original in file is not signed)

HARRIS PRESTON & GUTKE
ATTORNEYS AT LAW
31 FEDERAL AVENUE
LOGAN UTAH 84321
PHONE 752 3391

EXHIBIT I

41

BOOK 41 PAGE 029

IN THE DISTRICT COURT FOR CACHE COUNTY, UTAH

- - - - - - - - - - - - - - - - - -

NORMAN BARBER, Etal,
Plaintiff

vs.

THE EMPORIUM, Etal,
Defendants

Civil No. 17630

MEMORANDUM DECISION

- - - - - - - - - - - - - - - - - -

Defendant has filed a Motion for Amendment to the Judgment, Relief from Judgment and Stay of Execution. Generally the thrust of defendants' argument goes to questions of how the judgment should be enforced and priorities in connection therewith.

Therefore, defendants' motion is denied, of course, without prejudice to take any appropriate action when the judgment is sought to be enforced.

Counsel for plaintiff is requested to prepare the appropriate order.

Dated this 21st day of May, 1979.

DISTRICT JUDGE

17630-23

EXHIBIT J

BOOK 42 PAGE 185

B. H. Harris
HARRIS, PRESTON & GUTKE
Attorneys for Plaintiff
31 Federal Avenue
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Telephone: (801) 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiffs, vs. THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR., General Partners. Defendants.	ORDER DENYING MOTION TO AMEND JUDGMENT, RELIEF FROM JUDGMENT AND STAY ON EXECUTION Civil No. 17630

Defendants having filed a motion for Amendment to Judgment, Relief from Judgment and Stay on Execution in the above entitled matter and the Court having issued its memorandum decision on May 21, 1979, and based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' motion is hereby denied without prejudice to take any appropriate action when the judgment is sought to be enforced.

DATED this 5th day of June, 1979.

District Judge

17630-24

EXHIBIT J

HARRIS PRESTON & GUTKE
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LOGAN, UTAH 84321
PHONE 752-3551

Raymond N. Malouf/dh (5:EMBAMTQW.RDP)
MALOUF LAW OFFICE
Attorneys for Defendants
150 East 200 North #D
Logan, UT 84321
Telephone: 752:9380

DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and
HELEN BARBER,
husband and wife,
Plaintiffs

MOTION TO QUASH
WRIT OF EXECUTION

vs.

THE EMPORIUM PART-
NERSHIP, et. al.,
Defendants

Civil No. 17630

Come now the Defendants and move that a defective and fraudulent Writ of Execution which Plaintiffs caused to be issued over the seal of this Court October 8, 1986 be quashed, and that all proceedings, process, execution and advertising efforts flowing from said writ be rescinded, cancelled, set aside and terminated immediately and Plaintiffs be ordered to terminate all proceedings under said writ.

The Writ is defective because it is not in conformity with Rule 69(b) U.R.C.P. which requires that the Writ recite the amount actually due on the judgment. The writ is fraudulent because the judgment specifically does not support the amount claimed to be due.

The Writ of Execution recites there is $39,369.33 due. On July 18, 1986, the Plaintiff caused a Writ of Execution regarding this same judgment to be issued which showed a total amount due of $21,232.80. The Plaintiffs caused a Partial Satisfaction of Judgment to enter October 7, 1986 showing $866.47 was paid December 31, 1982. It is obvious that the Writ of Execution issued October 8, 1986 is inconsistent with prior writs. It further is not in conformity with the specific language of the

EXHIBIT K

Judgment that says the total amount due is the principal "plus accrued interest until paid in the amount of $2,180..." (emphasis added). The language is parallel to the language in the Findings of Fact, the Conclusions and the prayer of the Complaint. Interest cannot be added because of the limitations of the judgment.

The Judgment has ~~not~~ been challenged by the Plaintiff since its entry April 18th, 1979. The Judgment provides for a specific amount of interest to be allowed on the principal in the amount set forth, from the date of judgment "until paid." The language in the judgment is in conformity with the prayer in the Complaint. No more is allowed by the judgment.

The Writ of Execution seeks for more damages than the judgment allows. There is no justifiable legal basis for Plaintiffs to gratitously interpret the judgment in their favor. There is no authority for Plaintiffs to now attempt to fraudulently obtain satisfaction of the judgment for more than the judgment allows by using a defective writ. At no time previously have Plaintiffs attempted to represent in pleadings filed in this Court that there was more money due in total than the judgment allows on its face, until the Plaintiff's October 8, 1986 writ of execution. This is a fraud upon the Court and Defendants, an abuse of process, and defective.

May 21st, 1979 the Court's Memorandum Decision signed by the Judge provided that the Defendants were entitled to take any appropriate action when the judgment is sought to be enforced. To quash this writ of execution is an appropriate action to take.

DATED this 7 day of November, 1986.

Raymond N. Malouf
Attorney for Defendants

EXHIBIT V

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President

of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

15-1-4. Interest on judgments.

Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of 12% per annum.

History: L. 1907, ch. 46, § 11; C.L. 1907, § 1241x9; C.L. 1917, § 3330; R.S. 1933 & C. 1943, 44-0-4; L. 1981, ch. 73, § 2.

Amendment Notes. — The 1981 amendment increased the interest rate from 8% to 12%.

Cross-References. — Interest to be included in judgment entry, Rules of Civil Procedure, Rule 54(e).

48-2-13. Loans and other business transactions between partnership and limited partner. (1) A limited partner also may lend money to, and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a prorata share of the assets. If, at the time of receipt, the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners, no limited partner shall in respect to any such claim:

(a) Receive as collateral security any partnership property or,

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability.

(2) Without prior written full disclosure to all limited partners of the terms and the collateral involved in a proposed loan by a limited partner, no limited partner shall make a loan upon the security of partnership property if, at the time such loan is made, the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(3) The making of a secured loan, or the receiving of collateral security, or a payment, conveyance or release in violation of the provisions of subsection (1) or (2) is a fraud on the creditors of the partnership.

History: L. 1921, ch. 88, § 13; R.S. 1933 & C. 1943, 69-2-13; L. 1975, ch. 139, § 1.

Compiler's Notes.

The 1975 amendment inserted "If * * * general or limited partners" at the beginning of the second sentence of subsec. (1); deleted "if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners" at the end of subd. (1)(b); inserted subsec. (2); redesignated former subsec. (2) as (3); inserted "The making of a secured loan, or" at the beginning of subsec. (3); substituted "subsection (1) or (2)" for "paragraph (1)" in subsec. (3); and made minor changes in phraseology and punctuation.

Collateral References.

Partnership ⇐ 366.
68 CJS Partnership § 471.
60 AmJur 2d 266, Partnership § 385.

Key Numbers. — Corporations ⇐ 507; Counties ⇐ 219; Drains ⇐ 20; Municipal Corporations ⇐ 1029; Process ⇐ 21, 23, 24, 50 to 58, 63, 64, 82, 84 to 111, 127 to 153; 161 to 165; Schools and School Districts ⇐ 119; States ⇐ 204; Waters and Water Courses ⇐ 179.

Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written notice other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58A(d), and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings) or pleadings asserting new or additional claims for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

Rule 56. Summary judgment.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

COLLATERAL REFERENCES

Contents of writ and to whom it may be directed. The writ of execu-
must be issued in the name of the state of Utah, sealed with the seal of
ourt and subscribed by the clerk. It may be issued to the sheriff of any
:y in the state (and may be issued at the same time to different counties)
vhere it requires the delivery of possession or sale of real property, it
be issued to the sheriff of the county where the property or some part
of is situated. If it requires delivery of possession or sale of personal
rty, it may be issued to a constable. It must intelligibly refer to the
ıent, stating the court, the county where the same is entered or docketed,
ames of the parties, the judgment, and, if it is for money, the amount
of, and the amount actually due thereon. It shall be directed to the
f of the county in which it is to be executed in cases involving real
rty, and shall require the officer to proceed in accordance with the terms
writ; provided that if such writ is against the property of the judgment
generally it may direct the constable to satisfy the judgment, with
st, out of the personal property of the debtor, and if sufficient personal
:ty cannot be found, then the sheriff shall satisfy the judgment, with
st, out of his real property.
ıe judgment requires the sale of property, the writ of execution shall
such judgment, or the material parts thereof, and direct the officer to
:e the judgment by making the sale and applying the proceeds in confor-
herewith. The judgment creditor may require a certified copy of the
ent to be served with the execution upon the party against whom the
ent was rendered, or upon the person or officer required thereby or by
obey the same, and obedience thereto may be enforced by the court.